



Defamation (NSW)

A Guide To The Basics



Introduction

In NSW, when something defamatory is published to a 3rd person, the “victim” can often sue for damages within 12 months unless a defence applies. Some types of “persons” cannot sue such as a company that employs more than 10 people.

Defamation law has assumed importance in recent times because of the prevalence of online publishing and the syndication of content. For instance, it is not uncommon for ordinary people and businesses to be defamed online by way of Facebook posts, Twitter posts and Google reviews. As a result, we are seeing an increase in the number of enquiries that relate to Internet defamation.

The harder question sometimes is whether or not something is defamatory, and if so whether to pursue litigation or just the removal of the offensive content from the Internet. Many clients consider the costs and risks of going to court to be prohibitive and many settle for an apology, the removal of content and in some cases payment of their legal costs.

Defamation 101

Defamatory matter

The way in which something is communicated, such as a disparaging Facebook post for instance, is known as the “defamatory matter”. A defamatory matter can be communicated in many different ways including: –

- the Internet e.g. blog posts, webpages, images, photos, comments to blogs etc.;
- phone e.g. text messages, sms or verbal conversations;
- social media e.g. Facebook posts, google reviews, tweets etc.;
- by radio broadcast.

Defamatory meaning

The next question is whether a defamatory matter carries a defamatory meaning that causes the plaintiff's reputation to be lowered e.g. an imputation that the plaintiff is a crook.

In New South Wales it is possible that a jury will determine this question.

Should You Proceed In NSW?

As a rule of thumb the matter should proceed where a defamatory matter was published. Sometimes the publication can take place in a number of different areas in which case the matter should proceed where the harm to place e.g. where the defamed person lives.

Defences to defamation

There are a range of defences available to defamatory publications including: –

- if the action is brought out of time e.g. later than one year from the date of publication;
- justification i.e. truth;
- contextual truth;
- innocent dissemination;
- consent;
- triviality;

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- an appropriate offer of amends was made;
 - et cetera.

The remedies

The maximum amount of general damages available to the plaintiff has been capped and is currently almost \$390,000. The damages need to relate to the harm suffered so that in many cases the amount of general damages will be a great deal lower than the maximum amount that can be awarded.

In some cases, where the defendant conducts itself reprehensibly, a plaintiff may be entitled to aggravated damages (that are in addition to general damages).

Generally, the party who wins the case will be entitled to his or her costs on the ordinary basis (unless an indemnity costs order is available).

The Procedure

If it is necessary to commence legal proceedings, because non-litigious methods cannot solve the issue, then the matter may proceed either in the District Court or in the Supreme Court depending upon the amount of damages involved.

It is possible that your case will involve more than just defamation as it could potentially involve criminal matters too (if physical threats have been made).

Before you commence legal proceedings make sure that you preserve the evidence, by taking photos and/or printouts of the material (for Internet publications) as the publication may be edited and/or removed. It is also useful to lodge a complaint with the website involved as it may be able to remove the content even if the publisher does not agree to do so.

Steps a “victim” should take

The Concerns’ Notice

Once you become aware that someone has published something defamatory about you then you may want to consider: –

- seeking legal advice from a [defamation lawyer](#);

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- asking the lawyer to prepare a concerns notice that sets out in writing, in accordance with the defamation legislation, the imputations you believe are defamatory of you. For instance if someone creates a Facebook post that says you “cheated on your exams” then some of the imputations that could be drawn are that you are lacking in honesty, and that you are guilty of academic misconduct. The concerns notice could very well ask for the removal of the material, require an apology and request that the other side pays damages and your out-of-pocket expenses in seeking legal advice.
 - Trying some self-help remedies to remove the offensive content by reviewing our blog post on a [“Basic guide to taking down offensive Internet content on Google Facebook and Twitter”](#).
 - Making a complaint to the police if the publication involves threats to your personal safety or if it contains explicit images of you.

Steps a “publisher” should take

The Offer of Amends

If you receive a concerns notice consider: –

- getting legal advice promptly;
- whether you have a defence to the whole of the claim or only a partial defence;
- in the event that you do not have a defence it may be appropriate to make an offer of amends, under the defamation legislation, that addresses the issues in the concerns notice by perhaps offering to remove the offensive content, apologising for its publication (and agreeing not to publish it again, and perhaps offering appropriate compensation. Compensation needs to be appropriate and reasonable. It is generally best for a lawyer to draft the offer of amends by ensuring it is done on a without prejudice basis (i.e. mark it as an offer of amends), that it is made in a timely fashion and that it is worded to make clear when exactly the offer will expire. Under the legislation such an offer must comply with the legislative requirements by for instance offering to publish a reasonable correction.

It is possible that an offer of amends could amount to a defence so that it is important to consider accepting such an offer when it is made (if it is reasonable and appropriate).

Litigant is based in Sydney, NSW, Australia and focuses on disputes including defamation law. You can contact us at: -

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